SUPREME COURT, U. S

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5670

MARINA MARTIN,

Petitioner

-vs-

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioner was prejudicially denied her right to counsel by the trial court by its appointment of two defense attorneys to represent petitioner and her co-defendant, either jointly or separately, in defendants' discretion.

STATEMENT OF THE CASE

On July 25, 1974, the Supreme Court of Indiana affirmed Petitioner Marina

Martin's conviction of first degree murder. Martin v. State, __Ind.__, 314 N.E.2d 60 (1974). On October 18, 1974, the same court denied a Petition for Rehearing herein. Martin v. State, __Ind.__, 317 N.E.2d 430 (1974)

The State of Indiana filed an indictment on May 4, 1972, charging Marina Martin and one Kenneth Thornton jointly with the premeditated murder of one Elizabeth Mays (Tr.pp.9-10). On May 5, 1972, both defendants were arraigned and pleaded not guilty (Tr. p.14). The single privately retained counsel for the defendants withdrew his appearance on July 28, 1972. Two attorneys were appointed to represent them (Tr.pp.22-24,138-140). The following colloquy ensued:

"THE COURT: I want two lawyers to represent these people, together or separately, whichever way they wish."

MR. KAMMEN: I understand." (Tr.p. 141).

Trial by jury began on August 29, 1972 (Tr.p.28). On September 1, 1972, the jury found Marina Martin and Kenneth Thornton each guilty of first degree murder (Tr.pp.102-103). On September 20, 1972, Petitioner Martin was sentenced to life imprisonment (Tr.p.118).

SUMMARY OF THE ARGUMENT

Petitioner Marina Martin (hereinafter Martin) was not denied her right to counsel by the trial court's appointment of two defense attorneys to represent her and her co-defendant Thornton. Defendants were given the option of joint or separate representation; petitioner cannot complain of joint representation in the absence of a showing of prejudice

The petitioner's age is not relevant as she was tried as an adult from the inception of this case.

ARGUMENT

PETITIONER WAS NOT DENIED HER RIGHT TO COUNSEL

Firstly, it should be noted that petitioner's age has no relevance to the case at bar. Petitioner was tried as an adult, with all appropriate safeguards, not as a juvenile offender. As the Supreme Court of Indiana pointed out below, the Indiana juvenile court system had no jurisdiction over such a defendant due to the nature of her offense; thus, her treatment as an adult offender from the inception of this case was proper. See Martin v. State, __Ind.__, 314 N.E.2d 60, 67 (1974). Therefore, neither In re Gault, 387 U.S. 1 (1967) nor McKeiver v. Penn-

sylvania, 403 U.S. 528 (1971) has any bearing on the legal question before this Court. Marina Martin was tried as an adult, so it is an adult's right to counsel in a criminal trial which is before this Court.

Petitioner Martin is attempting to stretch the holding of Glasser v. United States, 315 U.S. 60 (1941), to a factual situation where two defense attorneys were appointed to represent Martin and her co-defendant, separately or jointly, in defendant's discretion. Neither the facts nor the law require the granting of certiorari to review the decision of the Supreme Court of Indiana affirming Martin's conviction of first degree murder.

In Glasser v. United States, supra, the trial court appointed Glasser's retained counsel to represent one of

Glasser's co-defendants over objection of said counsel and Glasser himself. The Court held that an attorney could not simultaneously represent conflicting interests of co-defendants. The record showed actual prejudice to Glasser, so his conviction was reversed. His co-defendant's conviction was affirmed.

Since Glasser, a number of Courts of Appeals have considered the question of one defense counsel representing co-defendants in a criminal trial. No decision deals with the unique factual context of this case where two counsel were appointed for two defendants, with the nature of that representation left to defendant's discretion. It is worthy of note that prior to this appointment, the single privately retained counsel for Martin and Thorton had withdrawn

his appearance after their arraignment. Yet petitioner now complains of joint representation without a showing of actual prejudice during her trial.

In United States v. Gallager, 437 F.2d 1191 (7th Cir 1971), cert. den. 402 U.S. 1009 (1971) the Seventh Circuit interpreted Glasser, supra, in light of a factual setting of two defendants represented by one retained counsel. It held that a conflict of interest within the meaning of Glasser must be more than mere speculation or surmise. Rather, a defendant must show a real conflict This is also the rule in the Second Circuit, where a specific showing of prejudice is required United States v. DeBerry, 487 F.2d 448 (2nd Cir 1973).

In United States v. Williams, 429 F.2d 158 (8th Cir. 1970), cert. den

400 U S 947 (1970), the District Court had appointed one attorney to defend two individuals The Eighth Circuit held that such an appointment was not per se violative of the right to counsel Rather, there must be a showing of actual conflict of interest Such a showing is also required in both the First and Third Circuits United States v Miller, 463 F 2d 600 (1st Cir 1972), cert den 409 U S 956 (1972); United States v Rispo, 460 F 2d 965 (3rd Cir 1972)

Only in the District of Columbia does the rule differ Starting in Campbell v United States, 352 F 2d 359 (D C Cir 1965), the Court of Appeals affirmed as to one defendant and reversed as to the second where one retained counsel represented two co-

defendants. Then, in Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967), the Court reversed as to two defendants who had been represented by one court-appointed counsel. Over dissent, the court held that the Government must show no prejudice beyond a reasonable doubt before such a conviction could be sustained. This holding was upheld in Ford v. United States, 389 F.2d 123 (D.C. Cir. 1967), where the Court created a per se rule in that Circuit for separate counsel.

It is the State of Indiana's contention that petitioner's conviction is within the ambit of either rule if not, it is the District of Columbia's Circuit Court of Appeals, not the other five Circuits, which is in error. The question is whether the trial judge,

on his own initiative, should have informed the defendants of any possible implications of joint or separate representation That advice, as now suggested by Martin, would be the equivalent of an exhortation in favor of separate representation, after defendants had previously chosen to employ a single defense counsel There is no authority known which would require the trial court so to interfere in the attorney-client relationship Moreover, were such an exhortation given, it would be likely that a convicted defendant would cite that action as error It would appear likely that an ingenious and astute attorney could hypothecate just as much possible prejudice from separate representation as has been hypothecated here from joint representation Nor is

the specter of plea bargaining raised by counsel credible in light of the fact that Martin, not her co-defendant, shot and killed Elizabeth Mays during the robbery of a gas station (Tr.pp.586-588). Neither is there any constitutional punishment for first degree murder in Indiana save life imprisonment. Furman v. Georgia, 408 U S 238 (1972); Adams V. State, __Ind.__, 284 N.E.2d 757 (1972).

There was no showing of prejudice in this case. Indeed, in light of the fact that two appointed defense attorneys are involved, it appears that there is a serious question as to the applicability of Glasser to this case. Indiana by its own Constitution and the Constitution of the United States must furnish petitioner Martin with defense counsel. Lane v. Brown, 372 U.S. 477

(1963). It may not attempt to force separate representation on a criminal defendant. Marina Martin was not denied her right to counsel by the State of Indiana.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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